

The Brotherhood of Locomotive Engineers
National Legislative Board - Canada



**In the matter
of the
Advanced Notice of Proposed
Rulemaking
(ANPR)**

Docket No. FRA 2002, Notice No. 1



George Hucker
International Vice President and
National Legislative Representative – Canada
February 14, 2002 – Washington, D.C.

Brotherhood of Locomotive Engineers

National Legislative Board - Canada

Submission to the

United States

Federal Railway Administration

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(ANPR)

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The membership of the Brotherhood of Locomotive Engineers would like to thank the Committee for the opportunity of making this submission on the Advanced Notice of Proposed Rulemaking regarding the control of alcohol and drug used within the Canadian railway industry.

The Brotherhood of Locomotive Engineers represents approximately 5,000 locomotive engineers working in passenger, freight, commuter and yard service who are governed by Canadian Laws and Regulations. As you are well aware, the locomotive engineer has the ultimate responsibility for the safe operation of all rail traffic in Canada, and they are understandably very concerned about the effect this latest proposed action by the FRA will have on them and the Canadian railway industry. The Brotherhood believes in safe and secure railway operations, manned by employees who are fit and alert in every way in order that they may perform their duties in a responsible manner.

The emphasis of this Brief will be centered on the Brotherhood's opposition to the extra-territorial imposition of random drug and alcohol testing on the Canadian railway industry through the removal of the exemption contained in the present 49 CFR Part 219 for foreign railway foreign based (FRFB) operating crews. We believe that the "draconian" provisions of Part 219 have no place in the Canadian railway operating environment.

Part II, Section A – Safety Sensitive Role of Train Employees at page 64001, column 3 and at 64002, column 1, present a number of reasons why train service employees in Canada need to be included in the provisions while operating trains in Canada. The FRA states:

1. "Train crew members can become fatigued because of the long and varied hours they are expected to work."
2. "Adding to the criticality of the train crew's need to be subject to an effective safety program that encourages them to be in the best possible physical and mental state is the environment in which they work."

3. “Train crews do not experience the deterrence provided by the timely oversight of a supervisor because their normal, independent working conditions.”

To substantiate its position, the FRA puts forward the fatigue of working long and varied hours and the failure to sound the horn at a road crossing as contributing factors to unsafe railway operations in Canada. The reality of Canadian railway operations is that crews are either in a present fatigue reducing/management program developed between the railways and the unions, or in the design stage of a fatigue-management program mandated by the new draft Hours of Service Regulations. Train crews on Canadian National in Western Canada have scheduled pools in which the crews are aware of when they are going to work several months ahead of their scheduled runs. Canadian National Central and Eastern regions operations have scheduled trains with assigned crews on those trains. Canadian Pacific Railway is presently in the process of designing fatigue-management programs to reduce the fatigue levels of their operating employees. The results of the trial project in Calgary, Alberta are being studied with the view of expanding that design in the rest of the railway system. These programs at both railways have been developed from the data/medical evidence gathered from the AAR Work/Rest Task Force Study and Report and the CANALERT Study and Report. The Canadian railway labour unions and companies are currently involved with the FRA’s NARAP Committee to expand the comprehension of fatigue and its management within the North American railway industry.

The second quote also exposes a lack of understanding of the reality of the Canadian railway industry and what is required by the Canadian laws. Part II of the Canada Labour Code mandates and regulates the Companies under Federal jurisdiction to have Senior Health and Safety Policy Committees comprised of Senior Union Officers and Company Management to oversee the local Workplace Health and Committee, made up of local representatives in order to ensure that a safe workplace environment is maintained. These Committees, from the Boardroom to the Shop floor, are at hand to oversee the day-to-day Company’s operations and activities. Transport Canada and Human Resources Development Canada (Labour Canada) have total oversight responsibility of these Committees and their activities, and are prepared to

intercede where they deem it necessary. These Health & Safety workplace Committees inspect the workplace and, coupled with the SOFA Committees, provide a safe work environment where individuals with a substance abuse problem can be easily identified and placed into a Company/Union sponsored EFAP program. A much less draconian approach, we feel, than random drug and alcohol testing.

In the third quote there is a lack of understanding of the reality of the Canadian railway operations, resulting in the authors of the proposed rulemaking putting forward an unsustainable position. Presently, locomotive engineers are generally supervised at:

- (a) the beginning of the tour of duty;
- (b) prior to leaving the reporting location;
- (c) during the tour of duty by company supervisors monitoring the operations or Transport Canada Safety Officers riding on trains at random intervals;
- (d) upon completion of the trip at the designation terminal.

The Canadian Railway Operating Rule (CROR), General Rule A, requires that fellow employees report a crew member that they suspect of being under the influence of a substance. With all of the above supervision and controls in place, random testing is not necessary to ensure yet another deterrent for substance abuse.

The Railway Safety Act, Section 35 – Medical Information, subsections (1), (2) and (3) states:

“(1) A person who holds a position that is declared by regulations made under paragraph 18(1)(b) or by any rule in force under section 19 or 20 to be a position critical to safe railway operations, referred to in this section as a “designated position”, shall undergo a medical examination organized by the railway company concerned, including audio-metric and optometric examination, at intervals determined by the regulations made under paragraph 18(1)(c)(iii) or by any rule in force under section 19 or 20.”

“(2) If a physician or an optometrist believes, on reasonable grounds, that a patient is a person described in subsection (1), the physician or optometrist shall, if in their opinion the patient has a condition that is likely to pose a threat to safe railway operations,

(a) by notice sent without delay to a physician or optometrist specified by the railway company, inform the specified physician or optometrist of that opinion and the reasons for it, after the physician or optometrist has taken reasonable steps to first inform the patient, and

(b) without delay send a copy of that notice to the patient,

and the patient is deemed to have consented to the disclosure required by paragraph (a).”

“(3) A person who holds a designated position in a railway company shall, prior to any examination by a physician or optometrist, advise the physician or optometrist that the person is the holder of such a position.”

When the Safety Critical employee is required to take their periodic medical, subsection 35(3) requires the Safety Critical employee to identify his safety critical position to the attending physician. Should the attending physician have reasonable grounds to suspect that the safety critical employee has a condition that will affect his/her ability to perform his/her duties, that physician, under subsection 35(2), is required to transmit that information to the employer's Chief Medical Officer (CMO). Anyone with a substance abuse problem would be identified at that time. Once the medical information has been transmitted to the CMO, subsection 35(4) allows the employer to use the information in a manner to ensure safe railway operations.

Should that information lead to a decision of substance abuse, the employee is put into the appropriate Company/Union program designed to help the employee with his/her problem.

Railway Safety Act Section 41 – Offenses, subsection (7) states:

“(7) Evidence relating to the presence or concentration of alcohol in the blood of a person obtained pursuant to any provisions of the Criminal Code is admissible in evidence in proceedings taken against a person under this Act in respect of a contravention of regulations respecting the use of alcohol, and section 258 of the Criminal Code applies, with such modifications as the circumstances require, to any such proceedings.”

All of the above give the railway industry and the FRA the results that the FRA is trying to achieve through the new proposed Rulemaking that would violate Canadian Laws. The Canadian Laws already provide the Canadian railway industry with the safeguards that the FRA believes they need to initiate with the extra-territorial imposition of US regulations into Canada.

At page 64002, column 2, the FRA relies on a 1987 survey commissioned by the Canadian Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry. From this Report, the FRA uses flawed data to justify the need for imposing this “draconian” rulemaking. The authors of the 1987 Survey Report, at page 23, put forward their conclusions. The Report states:

“First, interviews were carried out at a time of labour unrest. It seems likely that, despite our assurances of confidentiality and the general purpose of the research, respondents answered with caution. The degree to which there has been under reporting of drug and alcohol use, especially on the job, cannot be estimated. However, one must view the results of this study as a minimum measure of what is actually occurring.”

In the midst of a national railway strike with the possibility of back-to-work legislation, the authors realized that the validity of the Report must be called into question.

The Report continues:

“It must be pointed out, however, that the urban/rural/small city distinction (sic) was arrived at arbitrarily and may not have been exact enough to detect differences by type of location that may actually exist.”

Throughout the entire Report, the authors make arbitrary assumptions and conclusions on the number of actual individuals who have substance abuse problems. They have extrapolated their findings into massive abuse problems in the railway industry, figures that are greater than those found in the overall general Canadian population. The FRA has read into this out-of-date survey, based on questionable assumptions and conclusions, the basis of their self-serving conclusions of rampant drug and alcohol abuse in the Canadian railway industry that can only be solved by the “draconian” rules on which we are commenting.

The FRA rulemaking at page 64002, column 3 uses the arbitration award between CNR and the CAW as more proof of the widespread drug and alcohol abuse in the Canadian railway industry. At page 64002, columns 2 and 3, the NPRM states:

“As related in the submission of the employer’s counsel, CN has extensive experience in drug and alcohol testing over the past decade, including circumstances of hiring, promotion, reasonable cause and post accident testing. Its data confirms a relatively high incidence of positive test results across Canada, exceeding ten per cent over all categories of testing in Western Canada. While positive drug tests obviously do not confirm that individuals in the railway industry have necessarily used illegal drugs while at work, a substantial number of awards of the Canadian Railway Office of Arbitration provide a well-documented record of cases which reveal the unfortunate willingness of some

employees to have drugs or alcohol in their possession while at work, to use them while at work, or to report for work under their influence.”

At page 64002, column 3 the FRA continues with the award from Arbitrator Picher and states:

“The drug and alcohol abuse problem in Canada is relevant to the current problem posed by FRFB employees who are performing train or dispatching service in the United States and helps demonstrate the need for more comprehensive drug and alcohol testing of such employees.”

However, a review of the entire award of Arbitrator Picher points to a different conclusion. Arbitrator Picher, at page 83, states:

“Counsel (company) submits that another central distinction between CN’s policy and parts of the Imperial Oil policy that were struck down is reflected in the fact that the policy of Imperial Oil provided expressly for random testing for alcohol and drugs for employees in safety-sensitive positions. Random drug testing forms no part of CN’s drug and alcohol policy. On the basis of the foregoing distinctions Counsel submits that the reliance of the CAW on the **Entrop** decision and principles emerging from it, are misplaced, and given the differences between the two policies the decision of the Ontario Board of Inquiry in **Entrop** is a questionable precedent for the purposes of the dispute at hand.”

Arbitrator Picher at page 87 continues:

“Counsel (union) also stresses that the Company has an extensive degree of existing protections which call into question the necessity for its policy. He cites, in particular, Rule G of the **Canadian Railway Operating Rules (CROR)**, a provision previously found in the **Uniform Code of Operating Rules (UCOR)**, which has long prohibited the use or possession of drugs or alcohol by running

trades employees while on duty or subject to duty. Counsel also cites the protections which the company enjoys by virtue of the **Railway Safety Act**, the **National Transportation Act**, 1987, and relatively recent amendments to the **Criminal Code of Canada** (e.g. section 253) dealing with the prohibitions of impairment in the operation of trains. Counsel notes that the **Railway Safety Act** also contains provisions which permit alcohol testing (section 41(7)).”

Having reviewed these two quotes it is obvious that Arbitrator Picher, the resident arbitrator at the CROA, has a thorough knowledge of the railway industry, and one get a completely different view of the Canadian railway industry than that put forward by the FRA for proposes of the rulemaking.

As to the differences in the two regulatory regimes, Arbitrator Picher at page 109 states:

“As is evident from the extensive submissions of the parties, the issue of drug and alcohol testing in the workplace is one of considerable complexity and sensitivity, which has generated much jurisprudential, arbitral and scholarly analysis in Canada. The approach to substance use and abuse among employees in Canada has differed markedly from the legislative and regulatory approach found in the United States, particularly as it relates to employees in the transportation industry. The Canadian approach, as reflected in the decisions of the courts, boards of arbitration and human rights tribunals, has consciously sought to give the fullest possible protection to the privacy and dignity of individual employees, while respecting the legitimate business interests of employers responsible for a safety sensitive enterprise. While for a time parliamentary committees considered the possibility of legislated drug and alcohol testing in the transportation industry in Canada, there has been forbearance on the part of both federal and provincial authorities with respect to any initiatives in that regard which might parallel the American model. It may be that the sensitive treatment of the issue by Canadian courts and tribunals, including boards of arbitration, has given a sufficiently fair

and balanced protection to the interests of both employees and employers, so as to avoid the need for the more blunt and draconian alternative of legislative regulation. In any event, it is incumbent upon boards of arbitration called upon to deal with drug and alcohol testing policies in the workplace to do so with the greatest care, with the fullest appreciation for the rights and interests which are at stake, including those of employees, employers and, insofar as safety is concerned, the interests of the general public.”

The FRA, when dealing with the sensitive subject that is identified in the above quotation, at page 64003, column 1 states from the 1991 Omnibus Transportation Employee Testing Act:

“(6) Adequate safeguards **can be** implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual’s right to privacy, ensures that no individual is harassed by being treated differently from other individuals and ensures that no individual’s reputation or career development is unduly threatened or harmed;” (**emphasis added**)

While the Omnibus Act may allow for some sort of privacy safeguards to be put in place to protect an individual’s privacy, the Charter of Rights at section 8 already provides a fundamental right to privacy. Arbitrator Burkett in a recent 1999 arbitration award used section 8 of the Charter of Rights and Freedoms and stated:

“The right to one’s privacy is the right of protection from the unwarranted intrusion of others into one’s life. The underlying premise is that in a democratic society, an individual is free to live as he/she pleases without interference or monitoring, so long as there is no adverse impact upon another nor breach of the law. The Canadian acceptance of the right to privacy is traced through legislation, international and constitutional law, scholarly writings and judicial

statement.... The conclusion [there] is that privacy, as protected by Section 8 of the Charter is ‘an essential value in Canadian society.’”

This case follows the Imperial Oil case before the Ontario Human Rights Tribunal, and the Federal Court ruling in the Toronto Dominion Bank case, both on random drug and alcohol testing.

Where there is to be necessary protection for its membership, the Brotherhood of Locomotive Engineers will choose the Charter of Rights in favour of the Omnibus Act.

At page 64005, column 3, the FRA, in part, states:

“Because of the existing level of cross border train operations involving FRFB train crews, the potential for increase in such operations, and the increased risk...”

In reading this quote, one is left with the impression that there are thousands of miles of track involved, and that major cities are at risk by a great number of employees involved in drug and alcohol abuse. When looking at actual infrastructure and number of employees involved, the facts show the data concerns approximately 200 miles of track at 15 border crossing locations. However, when the proposed rule is examined under a cold hard light, it will dictate that thousands of employees will be required to be involved in the random testing pools. For example, CPR Winnipeg locomotive engineers man south-bound trains to Emerson, Manitoba, and enter the United States to Noyes, North Dakota, a distance of two miles. Winnipeg Terminal runs trains on the west-bound mainline, the north-bound main line and the southwest branch pool. For these two miles and approximately 10 employees, CPR would be required to place 100 locomotive engineers and 200 conductors/trainmen into random drug and alcohol testing due to the possibility of any of these employees manning the west/north/branch pools being used for a south train to Emerson. For a review of the entire situation, we have attached Appendix A and Appendix B showing both the locations and the trackage involved.

Given the entire situation, the FRA is not certain of what it really wants or what is needed. At page 64007, column 2, the FRA states:

“In this portion of the preamble, FRA solicits comments on whether to broaden the application of other part 219 requirements to reach operations and employees outside the United States.”

“For example, FRA invites comments on whether it should expand the basis for requiring post-accident testing under subpart C and testing for cause under subpart D to events that occur outside the United States and, if so, what those events should include. Currently, under part 219, FRA limits qualifying events for post-accident and “for cause” testing to those within the borders of United States.”

These testing requirements are already in place in the Canadian system. If indeed there is such a need, why not have the parties meet in order to openly discuss and attempt to satisfactorily resolve the issue instead of setting parameters for a court battle over a non-issue from the Brotherhood’s point of view.

With all due respect to the proposed legislation presented by the FRA, the Brotherhood can find no evidence that these changes would either improve upon or add to the laws currently in place in Canada. We feel strongly that the legislation as it exists fulfills the purpose and intent of both our governments - that is - the optimum safety of the public and our employees.

Once again, I thank you for having given me this opportunity to present the Brotherhood’s position to you.

George Hucker
International Vice President and
National Legislative Representative – Canada
The Brotherhood of Locomotive Engineers

Appendix A

Trackage traveled in the United States by Canadian crews:

British Columbia

- | | | |
|----|-------------------------------|----------|
| 1. | Kingsgate to East Port, Idaho | 03 miles |
|----|-------------------------------|----------|

Alberta

- | | | |
|----|--------------------------------|----------|
| 1. | Coutts to Sweet Grass, Montana | 02 miles |
|----|--------------------------------|----------|

Saskatchewan

- | | | |
|----|--------------------------------------|----------|
| 1. | North Portal to Portal, North Dakota | 02 miles |
|----|--------------------------------------|----------|

Manitoba

- | | | |
|----|-------------------------------|----------|
| 1. | Emerson to Noyes, Minnesota | 02 miles |
| 2. | Hickey to Baudette, Minnesota | 44 miles |

Ontario

- | | | |
|----|--|----------|
| 1. | Fort Francis to Rainier Minnesota | 03 miles |
| 2. | Sault Ste. Marie to Sault Ste. Marie, Michigan | 02 miles |
| 3. | Sarnia to Port Huron, Michigan | 02 miles |
| 4. | Windsor to Detroit, Michigan (Rouge Yard) | 02 miles |
| 5. | Fort Erie to Buffalo, New York (Frontier Yard) | 15 miles |

Quebec

- | | | |
|----|-----------------------------------|----------|
| 1. | Lucolle to Rouses Point, New York | 02 miles |
| 2. | Cantic to East Albert, Vermont | 02 miles |
| 3. | Lennoxville to Norton, Vermont | 03 miles |
| 4. | Huntington to Messina, New York | 23 miles |
| 5. | Corjers to Ste. Albans, Vermont | 25 miles |

New Brunswick

- | | | |
|----|---------------------------------------|----------|
| 1. | McAdam to Brownsville Junction, Maine | 70 miles |
|----|---------------------------------------|----------|

Total	205 miles
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Appendix B

Maps for Appendix A

British Columbia

Border Crossing area No. 1

Kingsgate, British Columbia. to Eastport, Idaho

CPR crews from Cranbrook, B.C. to Kingsgate, B.C to Eastport, Idaho

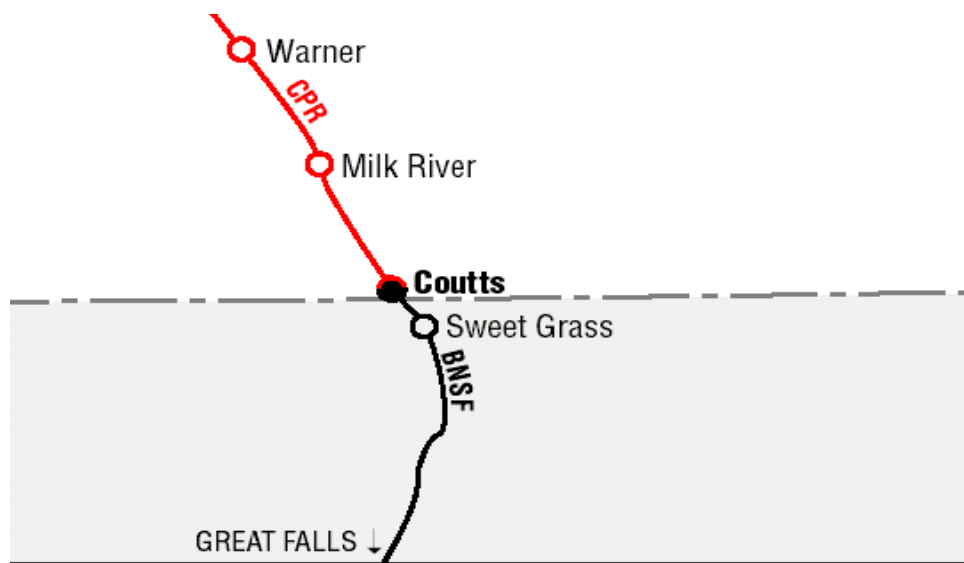


Alberta

Border Crossing area No. 1

Coutts, Alberta to Sweet Grass, Montana

CPR crews from Lethbridge, Alberta to Coutts, Alberta to Sweet Grass, Montana



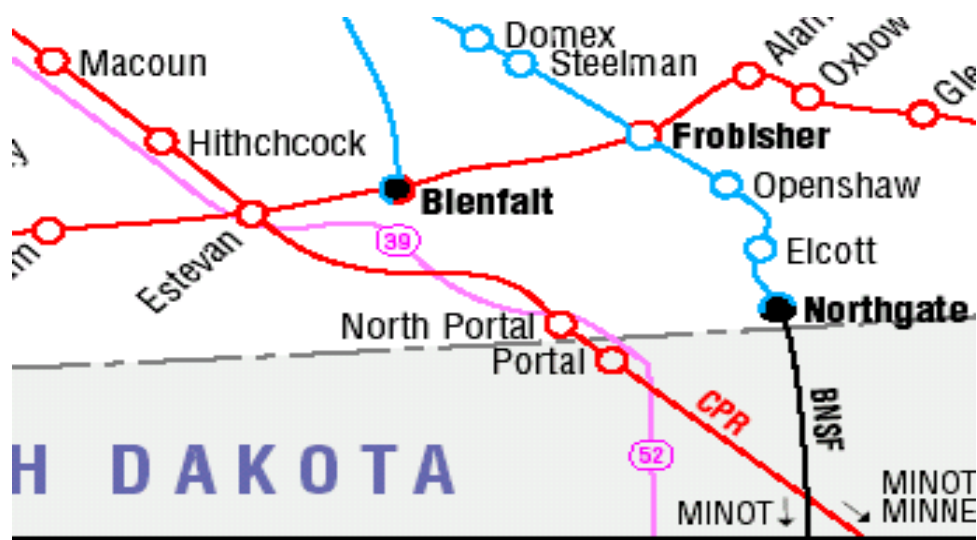
Saskatchewan

Border Crossing area No. 1

North Portal, Saskatchewan to Portal, North Dakota

CPR crews from Moose Jaw, Sask. to North Portal, Sask. To Portal North Dakota

(CNR trackage enters North Dakota at Northgate, Sask. – This line is not in use and has not been for some time)

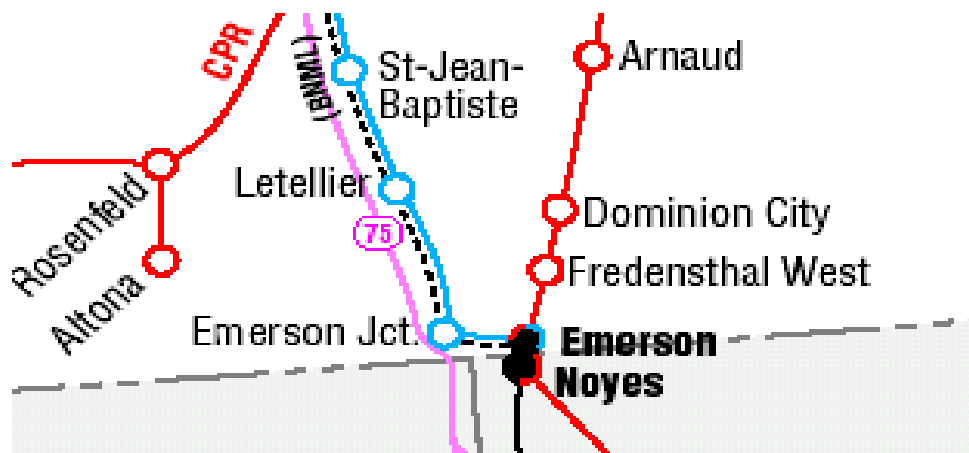


Manitoba

Border Crossing area No. 1

Emerson, Manitoba to Noyes, North Dakota

CPR crews from Winnipeg, Manitoba to Emerson, Manitoba to Noyes, North Dakota



Manitoba

Border Crossing area No. 2

Hickey, Manitoba to Rainy River, Ontario

CNR crews from Winnipeg, Manitoba to International Boundary, Minnesota to Baudette, Minnesota to Rainy River, Ontario

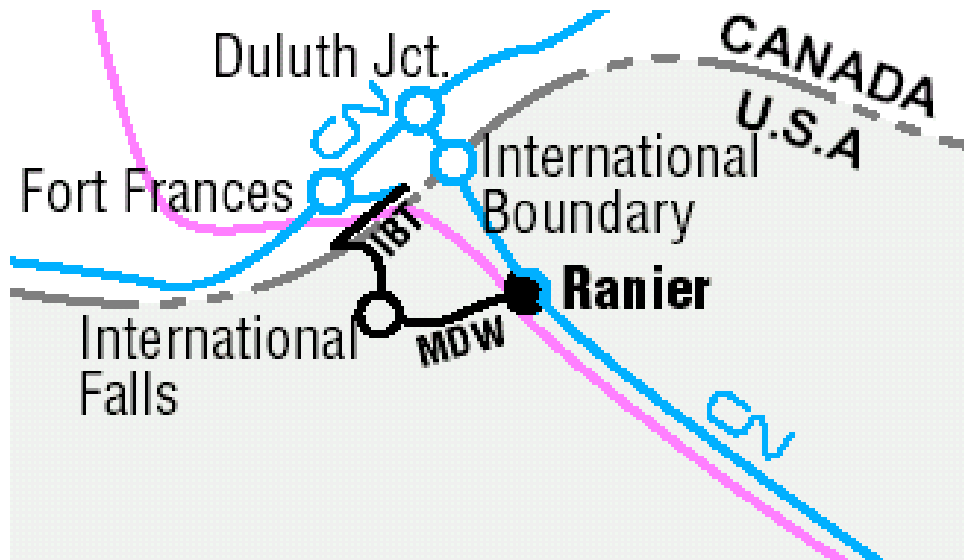


Ontario

Border Crossing area No. 1

Fort Frances, Ontario to Ranier, Minnesota

CNR crews from Winnipeg, Manitoba to International Boundary, Minnesota to Baudette, Minnesota to Rainy River, Ontario, to Fort Frances, Ontario to Ranier, Minnesota

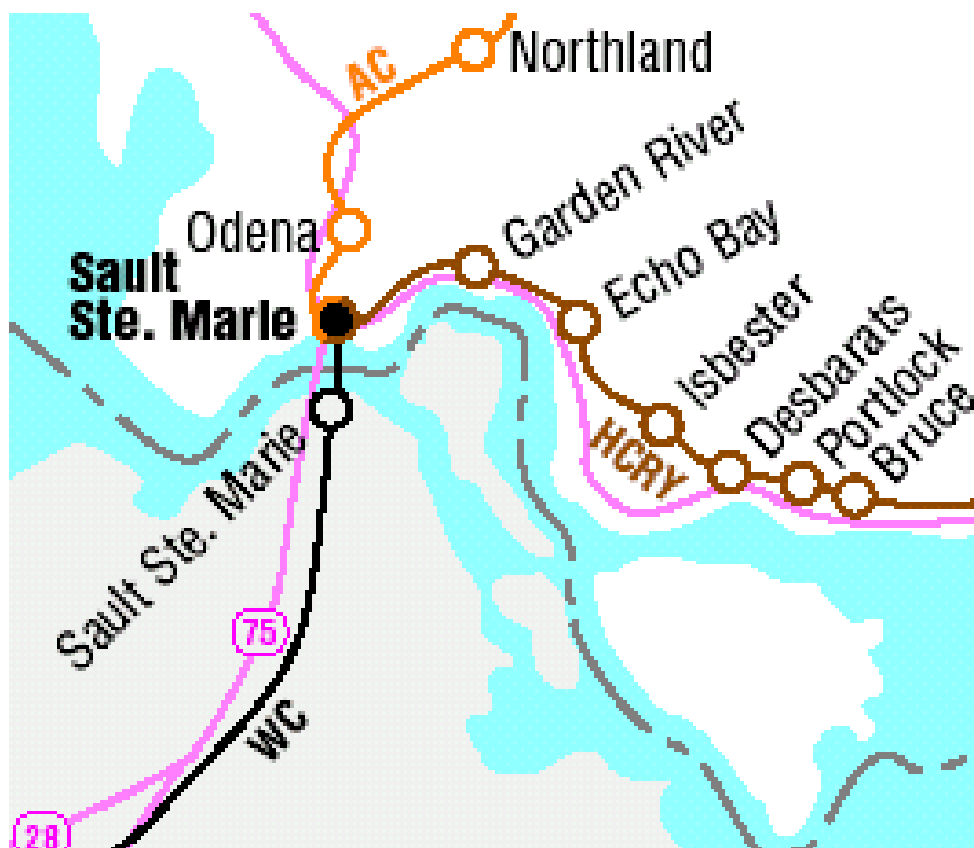


Ontario

Border Crossing area No. 2

Sault Ste. Marie, Ontario to Sault Ste. Marie, Ontario

CNR crews from Sault Ste Marie, Ontario to Sault Ste. Marie, Michigan



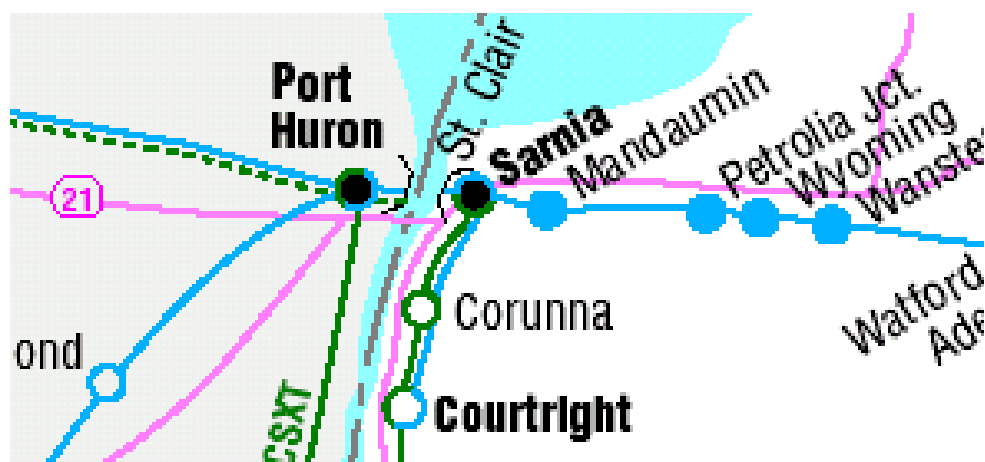
Ontario

Border Crossing area No. 3

Sarnia, Ontario to Port Huron, Michigan

CNR crews from Sarnia, Ontario to Port Huron, Michigan

CPR crews from London, Ontario to Port Huron, Michigan



Ontario

Border Crossing area No. 4

Windsor, Ontario to Detroit, Michigan

CNR crews from Windsor, Ontario to Detroit, Michigan

CPR crews from London, Ontario to Detroit, Michigan



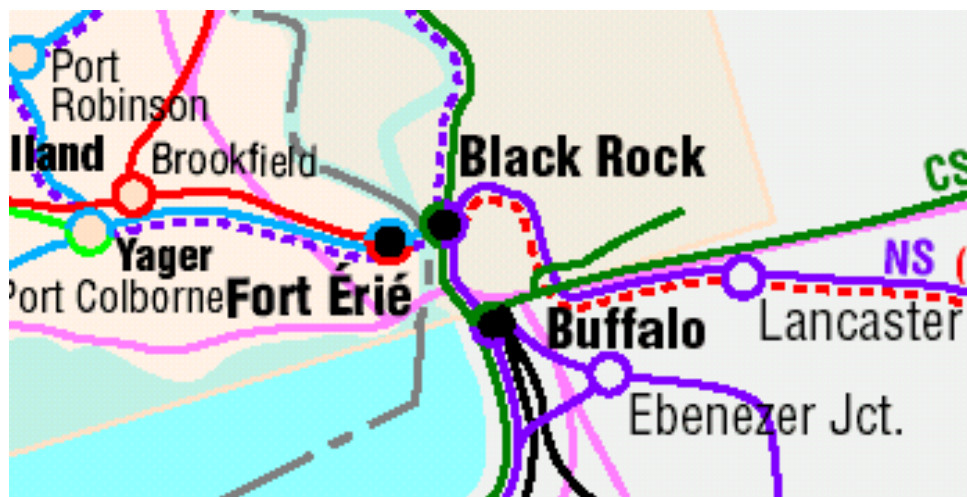
Ontario

Border Crossing area No. 5

Fort Erie, Ontario to Buffalo, New York

CNR crews from Hamilton, Ontario to Buffalo, New York

CPR crews from London, Ontario to Buffalo, New York



Quebec

Border Crossing area No. 1

Lucolle, Quebec to Rouses Point, New York

CPR crews from Montreal, Quebec to Rouses Point, New York



Quebec

Border Crossing area No. 2

Cantic, Quebec to East Alburg, New York

CNR crews from Montreal, Quebec to East Alburg, New York

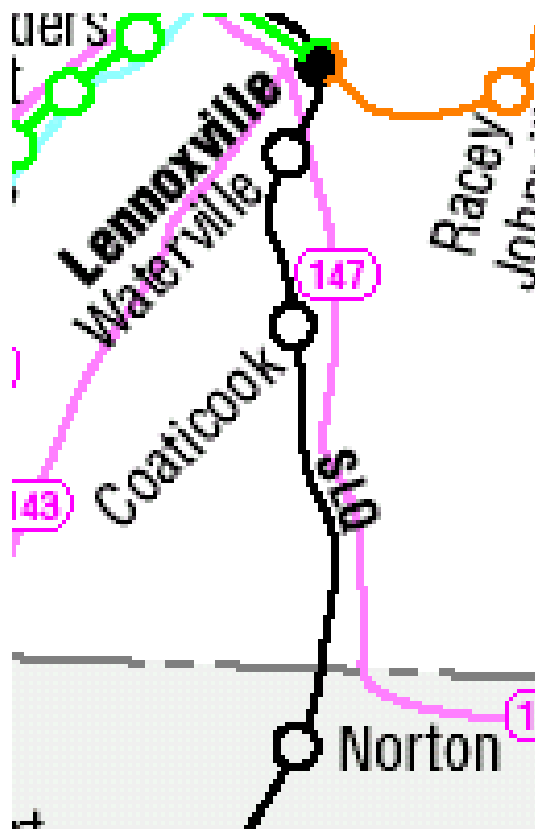


Quebec

Border Crossing area No. 3

Lennoxville, Quebec to Norton, Vermont

SLQ crews from Lennoxville, Quebec to Norton, Vermont

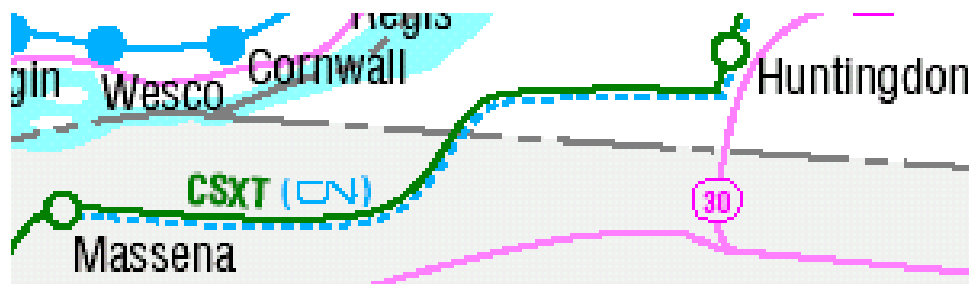


Quebec

Border Crossing area No. 4

Huntington, Quebec to Messina, New York

CNR crews from Montreal, Quebec to Massena, New York

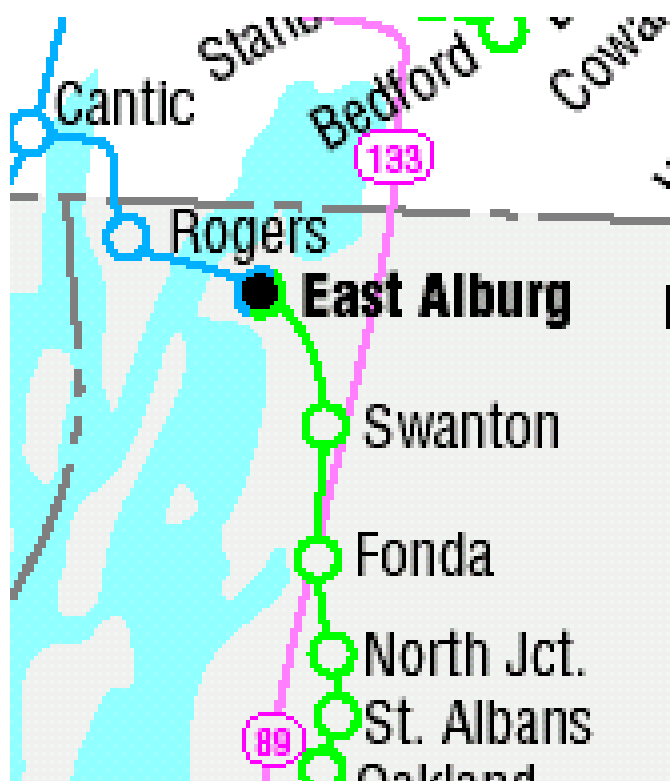


Quebec

Border Crossing area No. 5

Corjier, Quebec to Ste. Albans, Vermont

CNR crews from Corjier, Quebec to Ste. Albans, Vermont



Quebec

Border Crossing area No. 6

Lennoxville, Quebec to Long Pond, Maine

CDAC crews from Lennoxville, Quebec to Long Pond, Maine



Quebec

Border Crossing area No. 1

McAdam, New Brunswick to Brownsville, Maine

NBSR crews from McAdam, New Brunswick to Vanceboro, Maine

